

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE AMERICAN COAL COMPANY

and

Case 14-CA-25400

BILL BISHOP, An Individual

Christal J. Cuin and Paula Givens, Esqs.
for the General Counsel.
Richard E. Lieberman, Jules I. Crystal,
and James A. Lawson, Esqs., (Ross & Hardies),
of Chicago, IL, for the Respondent.
Richard J. Whitney, Esq., (Speir & Whitney),
of Carbondale, IL, for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. On December 22, 1998, Bill Bishop, an individual, filed a charge in Case 14-CA-25400 against the American Coal Company, Respondent herein.

Thereafter, on May 28, 1999, the National Labor Relations Board, by the Acting Regional Director for Region 14, issued a complaint, which was amended on August 5, 1999 and again on August 25, 1999.

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, when on June 23, 1998 it laid off 33 employees because the employees formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities and further that Respondent violated Section 8(a)(1) of the Act when on January 8, 1999 by its Chief Executive Officer Robert E. Murray it "informed employees that Respondent would not hire employees who supported the Union" and "informed employees that it had terminated employees because of their support for the Union and now that it was re-hiring it would not hire employees who supported the Union."

Respondent filed an Answer in which it denied it violated the Act in any way.

The case was tried before me in West Frankfort, Illinois, from August 31, 1999 through September 3, 1999 and in Harrisburg, Illinois, from November 1, 1999 through November 5, 1999.

Based on the entire record in this case, to include post hearing briefs submitted on March 20, 2000 by the General Counsel, Respondent, and the Charging Party, and upon my

observation of the witnesses and their demeanor, I have concluded that Respondent did not violate the Act in any way. More specifically I make the following:¹

Findings of Fact

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I. Jurisdiction

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At all material times, Respondent, a Delaware corporation, with an office and coal mining facility in Galatia, Illinois, has been engaged in the underground mining and surface preparation of coal for shipment.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. The Labor Organization Involved

Respondent admits, and I find, that at all material times the United Mine Workers of America, herein the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

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III. The Alleged Unfair Labor Practices

A. Introduction

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In early January 1998 a group of 5 employees who worked for Kerr-McGee at the Galatia, Illinois, coal mine went to see a representative of the United Mine Workers seeking assistance in organizing the employees at the Galatia coal mine. The 5 employees were Bruce Clarry, Larry Brown, Mark Hall, David White and George Yarbrough. All but Mark Hall would later be laid off after the mine was sold to Respondent. The union was somewhat reluctant to assist these employees as previous efforts to organize the mine had not met with success.

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The 5 employees returned to work with union authorization cards and union stickers and tried to get their fellow employees to join the union.

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Kerr-McGee resisted the union organizing effort and campaigned against the union. It urged its production foremen, supervisors and managers to try to ascertain how the employees felt about the union.

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On May 14 and 15, 1998 the National Labor Relations Board conducted a representation election at the Galatia mine. The employees voted 318 to 146 to reject representation by the Union. In other words, the Union lost the election by more than 2 to 1.

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On June 16, 1998, some two months after the election Respondent purchased the mine from Kerr-McGee. Respondent had earlier made what it called a "preemptive bid" to buy the mine prior to the union election but it was rejected by Kerr-McGee. After the election Respondent submitted a second bid to buy the Galatia mine which was accepted by Kerr-

¹ Respondent's motion to strike portions of the General Counsel's brief is denied. The arguments made by the General Counsel in the objected to portions of the brief are all fair comment and argument based on the evidence as she views it and not objectionable.

McGee. The second bid was 33.3% higher than the "preemptive bid" made by Respondent prior to the election and was accepted by Kerr-McGee.

Respondent's chief executive officer Robert E. Murray testified without contradiction that the Galatia mine was 26th in the country in productivity but 3rd in employment, i.e., although it had the third highest number of employee of any coal mine in the United States it was only 26th in productivity.

When Respondent took over the mine it set as its first task the elimination of a number of jobs. It wanted to eliminate between 210 and 250 of the more than 600 hourly and salaried jobs. Within a four day period Respondent selected 160 salaried employees and 86 hourly employees for permanent lay off.

It is alleged in this case by the General Counsel that the 33 named discriminatees in the Complaint were selected for permanent lay off and laid off on June 23, 1998 because of their support for the union during the union organizing campaign some months earlier when the mine was owned by Kerr-McGee.

It is also alleged that Respondent, through its chief executive officer Robert E. Murray, made certain Section 8(a)(1) statements on January 8, 1999 which also tend to support the allegation that the discriminatees were unlawfully laid off.

Respondent laid off more salaried employees (160) than hourly employees (86). Thirty three (33) hourly employees are alleged discriminatees. Respondent claimed it used a criteria for lay off that did not discriminate against employees based on union activity or support. Respondent admits discrimination in the lay off selection process in favor of women and minorities but vehemently denies discrimination in selection for lay off based on activity on behalf of the union or support for the union.

B. Respondent's criteria for lay off

With respect to salaried employees Respondent restructured the salaried job organization which resulted in the elimination of job positions, including an entire layer of management, and, after a series of interviews, salaried employees were selected to fill the remaining jobs. Those not chosen were laid off and they numbered 160.

With respect to hourly employees, which included the 33 discriminatees in this case, Respondent employed a different criteria for selecting employees for lay off. CEO Murray created a transition team to come up with a performance based criteria for the lay offs and they did. In the end, three criteria were selected upon which to base individual termination decisions: 1) the average number of yearly absence occurrences for each employee over a 3.5 year period, 2) the total number of disciplinary letters on file for each employee for the past 3.5 years; and 3) contemporaneous performance ratings completed by foremen, supervisors and management during the days immediately preceding the lay offs but after Respondent took over the mine on June 17, 1998, which, of course, was after the union campaign and the election.

C. Respondent's knowledge of union activity or support among the employees selected for lay off

In all 86 hourly employees were selected for lay off 33 of whom are discriminatees in this case. Some laid off employees were added and some deleted from the complaint at the request of the laid off employees apparently because they were pursuing other avenues of relief. The

case went to trial with 33 alleged discriminatees. One of the three criteria used in selecting hourly employees for lay off was performance evaluations furnished by foremen, supervisors and management. Again, these evaluations were made after Respondent took over the mine on June 17, 1998 and after the union election of May 14 and 15, 1998.

5 In her brief Counsel for the General Counsel has accurately recited the evidence at the hearing before me which leads me to conclude that Respondent threw its supervisors and agents knew of the union support and/or activity of the 33 discriminatees selected for lay off. See, e.g., *MacDonald Engineering Co.*, 202 NLRB 748 (1973).

10 In February 1998, discriminatee David L. Amberger put a union sticker on his hard hat. Mine manager Denzil Hughes, in the presence of production foreman Vernon Dunn, asked Amberger why he had the union sticker on his hard hat. Amberger responded that he was wearing the sticker to show his support for the Union. Hughes told Amberger that his days of filling in as a boss were over because he supported the Union.

15 About 3 weeks before the election, assistant mine manager Don McCluskey initiated a conversation with discriminatee Mark D. Anderton about the Union. It is uncontroverted in the record that Anderton told McCluskey that he supported the Union. On about seven or eight
20 occasions during the union campaign, McCluskey attempted to give Anderton anti-union literature. On one such occasion in mid-April, McCluskey told Anderton that he supposed Anderton did not want any of the anti-union literature.

25 During the union campaign discriminatee James A. Barton wore a union sticker on his hard hat. In mid-April, assistant mine manager Robert Dupuis walked up to mine examiners Barton, Dolly Monte, and Brad Slankard. Dupuis said that he was very disappointed that Barton, Monte and Slankard supported the Union. Dupuis stated that he did not feel they needed a union and that they could bargain with the company on their own without a union. Barton responded that he felt they needed a union and then asked Dupruis if they could bargain
30 without a union could he have a raise. Dupuis then walked out of the room. In his evaluation, Dupuis stated that Barton had a negative attitude towards his employment.

35 During the union campaign discriminatee Wayne K. Beal openly encouraged employees to support the Union. Beal regularly ate meals and spent non-working time with a group of strong union supporters including Tim Russell, Jerry Sexton and Bill Bishop. During the union campaign, assistant mine manager Hughes initiated a conversation with employees Lester Burklow, Vigil Carpenter and Wayne Beal. During this conversation, Beal stated he supported the Union because with a union employees would have seniority rights.

40 In February, discriminatee William Bish put a union sticker on his hard hat.

45 Assistant mine manager Hughes testified he knew that discriminatee and charging party Bill Bishop supported the Union. In February, Bill Bishop put two union stickers on his hard hat. Maintenance department manager Rocky Pike also admitted he knew Bishop supported the Union. Pike knew this because he observed Bishop wearing a union sticker. The notes supervisors put on their evaluations of Bishop show that they were happy with his work, but his disagreement with the manner his employer operated the mine resulted in a poor score for him. For example, mine manager James Wilson wrote, "good worker, but complains and potential troublemaker." Other supervisory comments about Bishop included, "disruptive" "bad attitude" and "deadwood or attitude problem."

In mid-April, discriminatee Michael Brogan began displaying a union sticker on his hard hat.

Discriminatee Larry Brown was one of the five employees who went to the Union to get the union campaign started. Larry Brown distributed about 75 union authorization cards. Right after the January 5 organizing meeting Larry Brown put a union sticker on his hard hat. In April, mine manager Doug Grounds initiated a conversation with Larry Brown. Grounds asked why Larry Brown thought the employees needed a union. Larry Brown replied that safety was the primary reason. In March, right after the Union had filed its petition seeking to represent Kerr-McGee's employees, Grounds, in the presence of mine manager Scott Schapkoff, asked Larry Brown why the employees wanted a union. Brown responded that employees were concerned about mine safety. Specifically, Brown told Schapkoff and Grounds that employees were concerned about the recent fire in the mine. Production foreman Doug Huie admitted that he knew Brown supported the Union. Maintenance department manager Rocky Pike also admitted he knew Larry Brown supported the Union. Pike knew this because he observed Brown wearing a union sticker. Brown also attended the vote count to show support for the Union.

Electrical instrumentation foreman Bob Conn told discriminatee Larry S. Brown that he had gotten word from upper management that Larry S. Brown was one of the union instigators. Larry Brown and Larry S. Brown are different men. Conn continued that Brown had better watch himself. Brown responded that he supported the Union because of safety issues. During his testimony, Conn did not deny this conversation with Brown. About 2 weeks before the election, mine manager William Penrod raised the issue of the Union to Larry S. Brown. Brown told Penrod that he supported the Union. Foreman Conn's evaluation of the three employees in his department who supported the Union, Dwight Pray, Larry S. Brown and Bruce Clarry, all refer to a problem with their "attitude." Pray was not laid off. Although Brown and Clarry were laid off.

On the day of the election, mine manager Scott Schapkoff asked discriminatee Benjamin Cain how he felt about the Union. Cain replied that he thought voting for the Union was a good thing.

In separate conversations during the union campaign, production foreman John Dunn and mine manager William Penrod asked discriminatee Lawrence E. Carmon how he felt about the Union. Carmon told Dunn and Penrod that he supported the Union. During the week preceding the May election, Dunn offered Carmon a "vote no" sticker, which Carmon declined. Maintenance department manager Rocky Pike testified he knew Carmon supported the Union because of statements Carmon made and because Pike observed Carmon wearing a union sticker.

In February, discriminatee George David Chick placed a union sticker on his hard hat and on his lunch box. Chick openly discussed his support for the Union and encouraged other employees to vote for the Union. Production foreman John Dunn admitted that he knew Chick was a leading union organizer. Mine manager William Penrod also admitted that he knew Chick supported the Union. Although Penrod testified that Chick had a performance problem, the evaluation mentioned only an "attitude problem." Mine manager James Wilson's evaluation of Chick stated that Chick was a good operator, but a potential troublemaker. Production foreman Doug Huie referred to Chick as, "hard to satisfy."

Discriminatee Bruce E. Clarry was one of the five employees who instigated the union campaign. Clarry gathered signatures on about 30 union authorization cards and distributed about 75 union stickers. He was also an observer for the Union at the May 14 and 15 election

and was present for the vote count. In February, foreman Roy Jones approached Clarry and asked him to remove the large UMWA bumper sticker Clarry had on his hard hat. In March, mine manager Doug Grounds told Clarry that he was concerned about the UMWA sticker and the organizing campaign because it would hurt the sale of the mine. Clarry replied that

5 employees were concerned about a mine fire and an explosion in the mine and safety was a key issue behind the union campaign. In March, maintenance foreman Bobby Jones told Clarry that his name was being thrown around among management as a union supporter and Clarry had better watch himself and be careful. During the May election, a local television station aired an interview with Clarry in which he stated he supported the Union because of safety issues.

10 Staff mine engineer James Webb admitted that he knew Clarry supported the Union. Statements made by supervision in their June evaluations also show that management knew Clarry was a leading union organizer. The following are comments supervisors made about Clarry in their evaluations: "until about a year ago, Bruce had a good attitude about his job and Galatia Mine. After that, he became a leader in the UMWA drive at Galatia. Even after the vote

15 failed, Bruce continues to carry the banner. He does continue to do his job. Bruce has great potential"; "thinks he is mistreated"; "hard to satisfy"; "a union organizer that has a chip on his shoulder for the company"; "UMWA organizer, I cannot trust him"; and "Bruce has a challenge with his attitude and was a strong union advocate". Maintenance manager Rocky Pike admitted that he knew Clarry supported the Union because he observed Clarry wearing a union sticker.

20 Maintenance foreman Roy Jones admitted he knew Clarry was a leading union organizer because of stickers he wore, because employees reported to Jones that Clarry attended union meetings and because of the people with whom Clarry associated. Jones testified that discriminatees David White and George Yarbrough were the other union organizers that Clarry associated with. Maintenance foreman Strunk, electrical instrumentation foreman Conn and

25 long wall maintenance foreman Talbert testified they knew Clarry was a union organizer.

About the second week of January discriminatee Barbara J. Crabtree put a union sticker on her hard hat. In his evaluation of Crabtree, production foreman Doug Huie referred to her as "hard to satisfy" and a "follower". Foreman Huie admitted he observed Barbara Crabtree

30 wearing a union sticker.

During the union campaign, discriminatee Tony J. Crisp wore a union sticker.

In mid-April, discriminatee Lance A. Damm put a union sticker on his hard hat. During

35 approximately the first week of May, assistant mine manager Robert Dupuis told Damm that he really needed to pay attention to the anti-union film that the company was showing. Damm had a pro-union sticker on his hat during this conversation.

In March, discriminatee Mark E. Donoghue put a union sticker on his hard hat.

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During the union campaign, discriminatee Marty J. Gayer distributed union leaflets at the mine. In March, mine manager William Penrod told Gayer that an employee had felt threatened when Gayer spoke to the employee about the Union. Penrod said if there were any other such reports Gayer would be disciplined. A few weeks before the election, production foreman Doug

45 Harner initiated a conversation with some employees during dinner. Gayer told Harner that he supported the Union because of safety issues and because, with a union, a layoff would have to be done by seniority. During meetings when production foremen John Burke and Steve Roye distributed anti-union literature, Gayer voiced his support of the Union. Maintenance manager Rocky Pike admitted he knew Gayer supported the Union because of statements he heard Gayer make.

Mine examiner and discriminatee Ernest Eugene Harvel put a union sticker on his hard hat in January. In mid-April, Harvel told assistant mine manager Terry Ward that Harvel believed the employees needed a union because of safety issues in the mine. Foreman Huie admitted that employees told him that Harvel supported the Union. On his evaluation, Huie wrote that Harvel was "hard to satisfy."

In February, discriminatee Dennis Lampert put a union sticker on his hard hat. During meetings when foremen John Burke and Steve Roye distributed anti-union literature, Lambert voiced his support of the Union. About two weeks before the May election, Roye verbally disciplined Lambert for soliciting for the Union during work time. In separate conversations, Lambert told maintenance manager Calvin Melvin and foreman Dave Strunk that he supported the Union. Melvin wrote in his evaluation that Lambert had an "attitude problem". Maintenance manager Rocky Pike admitted that he knew Lambert supported the Union because of statements Lambert made and because he observed Lambert wearing a union sticker.

In about March, discriminatee Alan L. Minton spoke with foreman Dwayne Lambert and advised him that he supported the Union because of the pension benefits provided by the Union. Maintenance manager Pike wrote in his evaluation that Minton had an "attitude problem."

In March, discriminatee Dolly M. Monte put a union sticker on her hard hat and assistant mine manager Dupuis approached her and said when this was all over she would be sorry for supporting the Union. Monte responded that she supported the Union because of safety issues in the mine. In mid-April, Dupuis told discriminatees Barton, Monte and Slankard that he was very disappointed that they supported the Union. Respondent laid off three of the six examiners on Monte's crew, Barton, Slankard and Monte.

Discriminatee Bernard A. Reynolds was one of three examiners on the B crew who Respondent laid off. Reynolds wore a union sticker during the union campaign.

During the first part of March, discriminatee Timothy L. Russell put a union sticker on his hard hat. Assistant mine manager Hughes and staff engineer Webb both admitted they knew Russell supported the Union. Hughes testified Russell was a hard worker, but that Russell complained a lot and talked down the company. Right before the May 14 vote, mine superintendent Mike Davey and assistant mine manager Hughes approached Russell. Davey commented "nice sticker." Right after the election, Davey and Hughes approached discriminatees Sexton and Russell and asked why they had pushed so hard for the Union. Russell responded he was concerned about safety.

In about March, discriminatee Thomas Simpson put a union sticker on his hard hat. Maintenance manager Pike admitted that he knew Simpson supported the Union because of statements Simpson made and because Pike observed Simpson wearing a union sticker.

In March, discriminatee William B. Slankard put a union sticker on his hard hat. In mid-April, assistant mine manager Dupuis walked up to discriminatees Barton, Monte and Slankard, and said that he was very disappointed that Barton, Monte and Slankard supported the Union.

In January, discriminatee Larry D. Thuilliez put a union sticker on his hard hat. Right after Thuilliez put the sticker on his hard hat, production foreman Charles Bowlin asked him why he wanted a union. Thuilliez responded that he was interested in the pension and benefits. During the union's campaign, Thuilliez distributed union stickers. During meetings when foremen Burke and Roye distributed anti-union literature, Thuilliez voiced his support of the

Union. In March, mine manager Doug Grounds asked Thuilliez why he supported the Union. Thuilliez responded it was because of the pension and retirement rights. Maintenance foreman Pike admitted he knew Thuilliez supported the Union because of statements Thuilliez made and because he observed Thuilliez wearing a union sticker. Electrical instrumentation foreman Jerry Whitehead put on his evaluation of Thuilliez "bad attitude never impressed me." Whitehead formed this opinion about Thuilliez based on comments he had heard Thuilliez make in the staging area. Whitehead admitted he could not make any assessment about Thuilliez' work, because he did not have enough knowledge about his work to comment on it.

In February, discriminatee Michael E. Vosbein put a union sticker on his hard hat. During the week preceding the election, assistant mine manager Hughes asked Vosbein why he supported the Union. Vosbein responded that it was because of safety issues. During that same week, mine manager Doug Grounds asked Vosbein why he was wearing a union sticker. Vosbein declined to respond. During the week of the election, mine manager James Wilson spoke to employees in Vosbein's crew and distributed some anti-union literature. While distributing this literature, Wilson asked for feedback. Vosbein told Wilson that it did not matter what Wilson said, he was still going to vote for the Union.

During the union campaign, discriminatee Michael L. Wallace wore a union sticker.

Discriminatee David G. White was one of the five employees who initially went to the Union to get the union campaign started. On about January 6, White put a union sticker on his hard hat. White gathered about 25 union authorization cards, openly encouraged employees to vote for the Union, told them about upcoming union meetings and distributed union leaflets. White attended the vote count to show support for the Union. Respondent laid off three out of the five mine examiners C crew, i.e. discriminatees David White, George Yarbrough, and Ernest Harvel. In mid-April, White asked assistant mine manager Terry Ward why management never approached him to talk about the Union. Ward responded that he knew White supported the Union because of safety issues and there was no way to change White's opinion. Maintenance foreman Roy Jones testified that employees David White and George Yarbrough were the other union organizers with whom Bruce Clarry associated. Webb testified he knew White supported the Union. Statements made by supervisors on their June evaluations of White include "My opinion of him is that he is opinionated and a troublemaker"; "bad attitude, contagious"; and "deadwood or attitude problem".

On his evaluation of discriminatee Edward A. Williams, production foreman Dave Colombo wrote, "big union man". About one week before the election, Colombo had initiated a conversation with Williams about the Union. Colombo told Williams that if the Union came in, the company might lose contracts and the mine might shut down. Williams told Colombo that he had 20 years in the Union and he supported the Union because it would allow him to increase his pension.

During meetings when foremen John Burke and Steve Roye distributed anti-union literature, discriminatee Charles T. Wright voiced his support of the Union. Maintenance Manager Pike admitted he knew Wright supported the Union because of statements Wright made and because he observed Wright wearing a union sticker. Electrical instrumentation foreman Jerry Whitehead put on his evaluation of Wright "bad attitude". Whitehead admitted that he formed this opinion about Wright based on comments he had heard Wright make in the staging area. Whitehead also admitted he could not make any assessment about Wright's work, because he did not have enough knowledge about it to comment on it.

Discriminatee George T. Yarbrough was one of the five employees who initially went to the Union to get the union campaign started. Yarbrough gathered about 50 union authorization cards and distributed about 75 union stickers. As a mine examiner, Yarbrough traveled throughout half of the mine every day. While traveling through the mine Yarbrough distributed union literature. As a mine examiner, Yarbrough's job required him to perform safety inspections. Mine safety was the most important issue in the union campaign. In April, mine manager Scott Schapkoff denied Yarbrough's request to take off on Easter Sunday. Schapkoff admitted that part of the reason he refused was because Yarbrough supported the Union. Maintenance foreman Roy Jones testified he knew discriminatees Yarbrough, White and Clarry were union organizers. Staff engineer James Webb admitted he knew Yarbrough supported the Union. Production foreman Doug Huie admitted he knew Yarbrough was a union supporter and that he provided Kerr-McGee's management information about which employees supported the Union.

Respondent admits that mine superintendent Mike Davey, mine managers Doug Grounds, Todd Grounds, William Penrod, Scott Schapkoff, and James Wilson, assistant mine managers Robert Dupuis, Denzil Hughes, Terry Ward, and manager of employee relations William "Bosco" Watson was supervisors and agents of Respondent within the meaning of the Act.

Respondent denies that the production foremen, electrical instrumentation foremen, maintenance foremen, maintenance department manager, and staff mine engineer were supervisors or agents within the meaning of the Act.

The men who held these positions under Kerr-McGee held the same positions under Respondent. They were not eligible to vote in the May 1998 election among Kerr-McGee's employees. And Respondent relied, along with other factors set forth more fully below, on their evaluations of employees in deciding which employees would be retained and which employees would be laid off. Lastly, the evidence at trial reflects that the production foremen directed the work of crews of men numbering between 8 and 10.

I find that the production foremen, electrical instrumentation foremen, maintenance foremen, maintenance department manager, and staff mine engineer are supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act.

D. Credibility Resolutions

In reaching the conclusions I reach that Respondent did not violate the Act. I have made a number of credibility resolutions. I will speak to a number of them separately.

1. Testimony of James Webb

James Webb was a staff mine engineer and after Respondent took over the mine but before the lay offs were announced on June 23, 1998 Webb testified he was interviewed by CEO Robert E. Murray and Murray told him in the presence of Mark Bartkowski and possibly Keith McGilton who came in during the interview that he wanted a list of employees who were dead wood and a list of employees who were union supporters because now is the time to get rid of them.

Webb said he prepared such a list and slipped it under the door of the office of Steve Rowland, a Kerr-McGee management official who did not go with Respondent.

The list contained the names of 25 hourly employees. They were listed as “dead wood or attitude problem.” Some of the names on the list were those of discriminatees in this case. They were not specifically identified as union supporters and some on the list were not union supporters.

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Webb claims he listed 10 discriminatees among the 25 because of their support for the Union, and did not specifically state they were union supporters or words to the effect because he had been instructed by Kerr-McGee not to identify employees in writing as being union supporters. His evaluation ranked all sorts of people and is quite lengthy and at no point does it state anything about a union.

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Murray claims he never asked anyone for a list of union supporters, which would include, of course, James Webb.

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Mark Bartkowski was not called as a witness by either side.

Keith McGilton, a management official of Respondent, testified that no one was asked to make a list of union supporters.

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Webb quit Respondent's employ some 6 months after Respondent took over the mine. At one point he made a claim against Respondent with the Illinois Department of Labor for vacation pay and severance pay.

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Looking at Webb's evaluation (GC 13 qq) which is several pages in length and hearing the testimony of Webb, Murray, and McGilton I do not credit the testimony of James Webb.

2. Ed Williams and Vern Brotherton

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Discriminatee Ed Williams, who had been a union man for 20 years, worked for Kerr-McGee. His immediate supervisor was production foreman Dave Columbo. During the union organizing campaign Columbo told Williams that he knew Williams was pro-union.

In his evaluation of Williams Columbo wrote that Williams was a “big union man.” According to Williams he and Columbo had not gotten along.

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Williams was laid off on June 23, 1998.

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Williams testified that early in the summer of 1999 he went to his daughter's softball game and met and spoke with production foreman Vern Brotherton. Williams asked Brotherton why he (Williams) had been laid off and, according to Williams, Brotherton said it was because Williams had too much union time and because of Dave Columbo, whom Brotherton said he saw write down Williams' name and put UMWA next to it. In addition, according to Williams, Brotherton said Murray asked him and other foremen to write down the names of “troublemakers, union people, and a (sic) policy abusers.”

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Brotherton admits he spoke with Williams at the game but testified that Williams asked him if he could put Brotherton's name down as a job reference and Brotherton said yes. And that was all that was said.

I credit Williams. He appeared honest and was corroborated by the fact that Columbo did put in writing in his evaluation of Williams that Williams was a “big union man.”

Brotherton's statement to Williams is not alleged as a violation of the Act but was introduced by the General Counsel to show Respondent's motivation in selecting employees for lay off.

5 Just because Brotherton thought that Williams was selected for lay off because of his support for the union doesn't make it so.

10 Brotherton may have thought that this was the reason Williams was laid off and he is in good company because counsel for the General Counsel firmly believes likewise but on the basis of all the evidence I conclude otherwise. I do not credit as accurate Williams' statement in its entirety about what Murray said to Brotherton and the other foremen. I do not find that Murray asked the foremen to list "union people" but Brotherton well might have said this to Williams.

15 3. Derek Haskins and Bruce Hill

Derek Haskins was laid off on June 23, 1998 but is not a discriminatee in this case.

20 He testified that he spoke with Bruce Hill, Respondent's Vice President for Human Resources, in October 1998 at a Days' Inn in Benton, Illinois in connection with resolving a matter and Haskins told Hill that Haskins found it hard to believe that Respondent laid off discriminatee Marty Gayer.

25 According to Haskins, Hill said if you think Marty Gayer feels bad how do you think William "Bosco" Watson feels because Watson was asked to prepare a list of which employees supported the union and then Respondent let Watson go. Watson was Manager of Employee Relations.

30 Bruce Hill admits he met with Haskins and said how do you think Bosco Watson feel because Watson was asked to put together a list one day and fired the next. But, according to Hill, he was referring to a list of absenteeism and discipline and not a list of union supporters.

35 I credit Hill over Haskins. I do not believe Haskins said anything he did not believe to be the truth but it just doesn't make sense for Hill to have said to Haskins what Haskins claims he said about Watson being asked to prepare a list of union supporters.

40 Interestingly enough Watson worked in the building where one of the two weeks of trial was held in this case. He was readily available to be called as a witness. No one called Watson to testify.

4. Allegations by Rocky Pike

45 Rocky Pike was a maintenance department manager who was laid off in June 1998. He is a management official and not a discriminatee.

In April 1998 CEO Robert Murray toured the Galatia mine. This was before Respondent's purchase of the mine. Murray asked Pike if Pike thought the union would win the election. Pike said no and Murray said "good." This is not alleged nor is it an unfair labor practice. It does reflect that Murray would prefer that the mine remain non-union but I don't believe that is seriously disputed.

After Respondent took over the mine Pike claims that he was interviewed by Murray and Mark Bartkowski. Murray read him a list of employees' names and Pike was asked if they were union supporters or not. Pike answered Murray but doesn't remember the names of the employees he was asked about.

Bartkowski did not testify. Murray admitted he spoke with Pike and more than 100 others just after taking over the mine but denies Pike's allegations that he asked about union supporters among the work force. I do not credit Pike's testimony. Pike had a motive to fabricate, i.e., he had been fired by Respondent.

5. Carlos Burton and John Dunn

Carlos Burton was laid off by Respondent on June 23, 1998 but is not a discriminatee. Burton testified that he ran into production foreman John Dunn in a restaurant in Harrisburg, Illinois after he had been laid off.

He asked Dunn why he had been laid off and Dunn, who initially said he didn't know why, said, after Burton kept pressing him, that Dunn's understanding was that people were laid off because of workmen's compensation, sick days, and union support.

Dunn admits he ran into Burton at the restaurant but claims he told Burton that he (Dunn) did not know why Burton was laid off and didn't say anything about the union.

Dunn still works for Respondent. I found Burton to be quite credible and believe that when Burton pressed Dunn as to why Burton was laid off Dunn said that it could have been, in part, because of Burton's union activity. However that doesn't make it so. I find that Dunn really didn't know why Burton was fired but opined that workmen's compensation, sick days and union support were the reasons. Dunn may well have thought that union activity by Burton was a factor in his lay off and possibly others but I conclude otherwise.

6. Steve Falmier and Don Cotter

Steve Falmier was laid off by Respondent on June 23, 1998 but is not a discriminatee in this case. He testified that he asked production foreman Don Cotter after Respondent announced there would be lay offs if he (Falmier) would be kept on or laid off. According to Falmier, Cotter said it would depend on how active he was in the union and how many times he was hurt.

Cotter who left Respondent's employ in early November 1998 did not testify.

Falmier appeared believable and I credit his testimony. I find however that Cotter was expressing his opinion only. Even if production foremen are supervisors and agents within the meaning of the Act as I so find, they are low in the chain of command and there is no evidence that I credit which puts them in the group that made the decision as to who was laid off and what the criteria was for being selected for lay off.

7. "Mysterious Markings" on GC Exhibit 5

GC Exhibit 5 was a tally sheet Respondent used to record evaluation scores given employees by foremen, etc..

There is on GC Exhibit 5 something marked out or scratched out above the names of some of the discriminatees, i.e., Bill Bish, Bruce Clarry, George David Chick, Barbara Crabtree, Ernest Eugene Harvel, David White, and George Yarborough.

5 However, there is something marked out or scratched out above the names of several other people, i.e., Lynn Barnett, Bill Beltz, Jim Benns, Kelly Hefner, Terry Johnson, Roger Joyner, Ed Lanum, Tim Smith, Dave Spiller, Ron Wilson, and Sam Woods, none of whom are alleged discriminatees and about which there is no evidence they even supported the Union.

10 Respondent tried to explain the marked out or scratched out portions above certain names by saying they made marks to crosscheck similarly named persons on another list.

I don't know why the marked out or scratched out areas are there but it is for 7 of the 33 discriminatees and for another 11 person who are not discriminatees.

15 In other words, it doesn't help one way or the other in deciding whether or not Respondent violated the Act in any way.

20 E. The Lay Off of 86 hourly employees to include the 33 alleged discriminatees in this case

As noted above Respondent took over the Galatia Mine on June 16, 1998 and immediately set about the task of eliminating salaried and hourly employees. Within a period of 4 days Respondent had decided that 160 salaried employees and 86 hourly employees would be terminated. The legality of the lay off of the salaried employees is not an issue in this case. Further, it is not alleged that Respondent violated the Act in conducting a lay off of hourly employees but only that Respondent violated the Act in selecting the alleged discriminatees to be among the employees laid off.

30 On June 17, one day after the closing, a transition team was appointed by Murray to administer the managerial and operational transfer from Kerr-McGee to Respondent including the proposed work force reduction. Most of the members of the transition team were consultants retained by Respondent from Murray's other coal companies, and they were selected based upon their individual expertise and experience in various areas of the coal mining business. The transition team was comprised of the following individuals: Robert E. Murray; Murray's three sons Robert, Jonathan and Ryan; Donald Gentry; Maynard St. John; William Mallicoat; Mark Bartkoski, Eric Anderson; Clyde Borrell; Robert Moore; Paul Piccolini; John Forrelli; Greg Smith; Jerry Taylor; Jerry Fankhauser; Ernie Martin, Pat Swallie and Keith McGilton. No member of the team had ever been employed by Kerr-McGee, nor did any member have any prior knowledge of the mine or its hourly or salaried employees.

45 Within hours after their appointment to the transition team, team members traveled to Galatia from various locations outside Illinois to begin taking control of the business. Following their arrival in Marion, Illinois, at approximately midnight on June 17, the team was assembled in a local hotel conference room for a meeting regarding the transition process. There, Donald Gentry, the newly appointed president of Respondent, and Murray outlined a multitude of tasks to be completed by the team when they visited the mine later that morning. These tasks included delivering insurance and permit bonds to government agencies (to transfer title of the mine to Respondent) and analyzing the mine's myriad departments and processes for wastefulness and areas for improvement. In addition, and most critical for the eventual success of the operation, the transition team was advised of the economics behind the planned

reduction-in-force, citing the projected staffing figures in the financial plan, and the critical importance of effectuating layoffs within a matter of days.

Regarding hourly employees, Murray asked the transition team to retain the best employees, based on their objective work records. Although he added that attendance data, safety records, discipline histories, versatility, years-of-service and an employee's ability to help the company were relevant considerations, he left it to transition team members to develop the precise criteria for assessing their performance. Team members were not instructed to consider union affiliations or preferences, nor was there any discussion at the meeting, or any subsequent meeting, pertaining to unions, the United Mine Workers or the mine's recent organizing campaign and election.

Later that same morning (June 17), after arriving at the mine, the transition team convened in the staging area of the mine's administration building. At approximately 6:30 a.m., before the morning crew began its shift, the new owners conducted the first of a series of meetings with the workforce. At this meeting, and at subsequent meetings that day with other crews, the future of the Galatia operation was discussed, including mining locations, safety, scheduling, fostering communication with management, various customer issues, upgrading mine infrastructure (e.g., improving the mine's belt system, preparation plant and other raw coal handling facilities) and the acquisition of coal reserves. It was also announced that although most existing employee programs would remain in place under Respondent's management, Respondent would eliminate the Kerr-McGee anti-nepotism policy, restructure management and downsize the salaried and hourly staff. In particular, regarding hourly lay-offs, Murray apprized the workforce, as he had informed the transition team, that all employment decisions would be performance based.

Over the next six days, beginning on June 18, the transition team worked virtually around the clock to accomplish their assigned tasks, including preparation for the imminent reduction-in-force. Given the economic pressures to reduce the workforce as articulated in the financial problems it was determined that termination decisions had to be made within a matter of days. On June 23, only six days after arriving in Galatia, the team finalized its determinations and notified approximately 86 hourly employees of their termination. The salaried reductions of approximately 160 employees ("2 salaried for every hourly person, because they were top heavy in management") were accomplished within the same time frame.

Shortly before the formal closing, Gentry asked a senior officer with Kerr-McGee in Oklahoma to provide a current employee roster and attendance records for Galatia employees in preparation for the reduction in force contemplated by the financial analysis. The employee roster information was provided to Gentry and the data was transposed into an Excel worksheet format, detailing each employee's name, job title, pay rate, hire date and birth date. Prior to the transition team's arrival at the mine on June 17, the mine's personnel and payroll departments gathered various personnel data regarding work-days missed, disciplinary letters received, letter-grade performance ratings created by Kerr-McGee managers prior to the sale, and a document listing the number of absence occurrences for hourly employees. The performance ratings filled out some months before the sale to Respondent were not used as it turned out. As noted above Respondent relied on performance evaluations filled out just after Respondent took over the mine. Other than providing this data to the transition team, current or former Kerr-McGee management did not participate in the evaluation of employees or in the selection of employees for lay-offs, and at no time did Kerr-McGee ever provide Respondent with any information, either written or oral, regarding the union or non-union preferences of any of its employees.

As personnel data was gathered, it was provided to two members of the transition team, Eric Anderson, an operations engineer for Maple Creek Mining in Bentlyville, Pennsylvania, and Clyde Borrell, a senior projects engineer for the Ohio Valley Coal Company in Aladonia, Ohio, who were initially charged with assimilating the material. I credit the testimony of Anderson and Borrell. To accomplish this task, Anderson dictated the numbers to Borrell, who entered them on his laptop computer into an evolving spreadsheet. Borrell had been selected for a central administrative role in the hourly reduction-in-force selection process because of his expertise in spreadsheet programs and statistics, including data entry. Given the volume of employees under consideration, it was clear from the earliest stages of the transition process that large amounts of information would be analyzed. As the process continued and new information was provided to Borrell, he added the data to his laptop computer's data base, eventually generating a comprehensive spreadsheet which was used as the basis for the reduction selections.

Given their goal of retaining the best employees, it was necessary to determine the precise criteria by which the top performers could most accurately and most expeditiously be identified. To this end, prior to settling on three primary factors, the suitability of numerous performance-related criteria were considered. Ultimately, several criteria were excluded as too subjective or ambiguous, and – because of the short time period involved – impracticable. Specifically, safety infractions noted in employees' records were not considered as an appropriate yardstick for lay-offs, unless the infractions involved insubordination, since underlying information regarding safety-related incidents would be difficult to gather. It was also concluded that it would be arbitrary, for comparison purposes, to assign concrete numbers to different types and degrees of safety infractions. Length-of-service was also rejected as a factor, since newer employees in Respondent's non-legally objectionable judgment were not per se less valuable than employees with longer work histories. Additionally, the employee ratings contained in the Kerr-McGee hourly employee performance evaluations – 95% of which rated employees "Meets" expectations or higher – were too uniformly positive and superficial to be of use (Of the 443 employees who received Kerr McGee letter ratings, 308 (or 69.5%) received "Meets" ratings and 107 (or 24.1%) received "Exceeds" ratings). The relative homogeneity of these ratings did not meaningfully differentiate one employee from another, thus depriving them of evaluative utility in the process.

In the end, three criteria were selected upon which to base individual termination decisions: (1) the average number of yearly absence occurrences for each employee (over a 3.5 year period); (2) the total number of disciplinary letters on file for each employee (for the past 3.5 years); and (3) contemporaneous performance ratings completed by foremen, supervisors and management during the days immediately preceding the lay-offs. These factors were considered to be objective and quantifiable, and amendable to a numerical, systematic analysis – an important consideration given the number of terminations to be effectuated within a very short time period. As the process moved forward, the quantitative numbers derived from these three factors dictated the termination decisions.

With respect to the first factor, by considering absence occurrences rather than straight absences, Respondent wanted to distinguish employees who were sporadically absent – whose frequent absences disrupted the workforce and created repeated scheduling problems – from those employees who may have incurred numerous absences as the result of infrequent but protracted illnesses or injuries. Thus, based on documentation listing the yearly occurrence figures for each mine employee, the transition team members generated an Occurrence Rate, which it used as a key numerical benchmark for determining who would be terminated. This Occurrence Rate was determined by dividing the number of occurrences by 3.5, or a lesser number if the employee in question had not been employed by Kerr McGee for at least 3.5 years.

The second factor relied upon was supervisor evaluations, or foreman ratings. To gather these ratings, transition team members instructed foremen and supervisors to evaluate employees with whom they had directly worked and to evaluate other employees if they had knowledge of the performance of such employees. They were told to base their evaluations of the employees' work records, to rate the employees using a "1" to "10" scale ("10" being the most favorable) and to return the completed ratings within two days – by June 21.

As the foremen and supervisors completed their evaluations, they delivered them to Anderson and Borrell. Anderson reviewed and recorded the numerical ratings and, where necessary, converted reviewers' narrative comments into numerical "1" to "10" ratings when the reviewers failed to do so. Where a reviewer submitted written comments instead of numerical ratings, it was Anderson's responsibility to critically review the comments and convert the reviews into numerical ratings. In accordance with explicit instructions from Gentry, Anderson based all of his numerical ratings solely on work-related comments, and he ignored any remarks unrelated to actual work performance. In the six isolated cases (of the more than 1800 evaluations) where supervisors' comments specifically alluded to an employee's union preference, Anderson ignored such comments when formulating his ratings.

As Anderson reviewed the supervisor and foreman evaluations, he compiled a table with corresponding numerical ratings adjacent to each employee's name. Depending upon the number of foremen who had evaluated a given employee, Anderson tabulated, with a red-inked pen, one to twelve individual ratings for each employee. Since Anderson knew neither the foremen completing the evaluations nor the employees being evaluated, and because he did not have sufficient time to contact the evaluators to request follow-up information or investigate the specific criteria used in the foremen's comments, Anderson's task was limited to interpreting and recording the evaluations as written. After Anderson had recorded all of the individual foreman scores on the tabulation sheet, he read them to Borrell, who entered these figures into the master spreadsheet on his laptop computer. Using an averaging function in the spreadsheet program, Borrell thereafter generated an average foreman rating for each employee.

The third factor, which was reflected in a handwritten tally on Anderson's tabulation sheet (G.C. Exh. 5) under the heading "Discipline," was the number of discipline letters in each employee's Kerr McGee file. This data was also entered into the spreadsheet by Borrell. In some cases, asterisks were noted next to employees' names on the tabulation sheet to highlight disciplinary letters for egregious conduct, such as insubordination or safety violations where an employee was put at risk of bodily injury.

After all of the data pertaining to employee occurrences, discipline and foremen ratings was synthesized in the spreadsheet by Anderson and Borrell, certain threshold determinations were made regarding unacceptable and "gray-area" scores in each category. With respect to occurrences, an Occurrence Rate of "3.0" was deemed generally unacceptable, thus placing an employee with such a rate in the category of likely terminations. Those employees whose Occurrence Rates were slightly above or below "3.0" were considered to be in the gray area, and, depending on the two other key criteria – Foreman Rating and prior disciplinary letters – may or may not have been retained.

Regarding the foreman evaluations, each employee's numerical foreman rating was determined by dividing his or her total number of individual rating points (as recorded in Anderson's tabulation sheet (G.C. Exh. 5), by the number of foreman who evaluated that employee. In general, a foreman rating below five was considered "less than desirable." Here

too, however, there existed a range – slightly above or below “5.0” – where, depending on the employee’s two other rankings, the employee could have been selected for either termination or retention.

5 With respect to disciplinary letters, in most cases the presence of such a letter in an employee's file resulted in an unfavorable view towards the employee’s continued employment, especially if the employee’s Occurrence Rate or Foreman Rating was in the gray area. Absent
10 very favorable ratings in the other factors, the presence of more than one disciplinary letter resulted in the employee’s termination. In a few select instances, the reason for the discipline (i.e., the severity of the employee’s offense or insubordination) was considered, and in such cases, the discipline letter tabulations were cross-referenced to ascertain whether the particular employee’s discipline letter was severe, as indicated by an asterisk.

15 Two groups of employees were exempted from the review process: (1) employees on a workers’ compensation leave of absence, and (2) employees in the Mine’s Preparation Plant (“Prep Plant”). Employees in these categories were all retained, regardless of the individual rankings. With respect to Prep Plant operators, they were excluded from the spreadsheet (and thus retained) due to the highly technical nature of their work and the importance of running the
20 Plant as efficiently as possible during this critical period. During the transition process, at the request of mine supervision, four additional employees were removed from surface or underground jobs and reassigned to the Prep Plant because according to Clyde Borrell the “[P]lant was way behind in production.” Employees who were on Workers’ Compensation leaves also were exempted from the termination process. In addition, for purposes of
25 affirmative action, in several instances individual employees e.g., Gary Young (multiple sclerosis), Charles Duie (black) and Barbara Strickler (woman), within certain protected categories (e.g., African Americans, women, disabled individuals), whose scores would otherwise warrant possible terminations, were retained.

30 Based on the team’s analysis of Occurrence Rates, Foreman Ratings and Discipline Letters, 86 hourly employees were selected for termination. While some were selected because their numerical score in one of these categories was below the acceptable parameters set by the transition team, the majority was selected because their scores in more than one category, either independently or taken together, warranted their termination.

35 The following 14 alleged discriminatees were selected for termination because their scores in more than one of the dispositive categories (i.e., Occurrence Rate, Foreman Rating and Discipline Letters) – either independently or taken together – warranted their termination:

	NAME	OCCURRENCE RATING	FOREMAN RATING	DISCIPLINE LETTERS
40	1. David Amberger	3.14	6.0	“at least one”
	2. Michael Brogan	4.57	2.7	“serious discipline letter”
	3. Benjamin Cain	2.69	6.3	1
45	4. Lawrence Carmon	2.86	5.0	--
	5. George Chick	3.43	2.3	1
	6. Tony Crisp	3.43	2.4	“at least one”
	7. Mark Donoghue	2.86	6.8	“at least one”
	8. Dennis Lampert	3.71	5.4	--
	9. Allan Minton	3.71	4.3	--
	10. Bernard Reynolds	3.43	2.7	--
	11. Timothy Russell	3.14	3.8	“at least one”

12. Thomas Simpson	4.4	4.4	"at least one"
13. William Slankard	0.0	3.5	"severe discipline letter"
14. Edward Williams	3.25	2.6	--

5 In addition, 21 other hourly employees, who were not discriminatees were lay off for this reason.

10 The following 14 alleged discriminatees were selected for termination because of Foreman Ratings that were either in the "unacceptable" range or in the lower range of the gray area:

	NAME	FOREMAN RATING
15	1. James Barton	1.0
	2. Wayne Beal	2.0
	3. Ernest Harvell	2.0
	4. William Bish	"considerably below 5"
20	5. Bill Bishop	2.6
	6. Larry Brown	"considerably below 5"
	7. Larry S. Brown	1.0
	8. Bruce Clarry	4.0
25	9. Barbara Crabtree	3.5
	10. Marty Gayer	4.0
	11. Dolly Monte	2.0
	12. Michael Vosbein	2.6
	13. David White	1.8
30	14. George Yarbrough	1.6

In addition, 19 other employees, who were not discriminatees, were laid off for this reason.

35 One alleged discriminatee, Lance Damm, was terminated because he had four discipline letters in his Kerr-McGee file.

40 Finally, the following 4 alleged discriminatees were selected for termination due to Occurrence Rates that were unacceptable or in the gray area:

	NAME	OCCURRENCE RATE
45	1. Mark Anderton	3.14
	2. Larry Thuillez	2.57
	3. Kenneth Wallace	6.0
	4. Charles Wright	2.86

In addition, 10 other employees, who were not discriminatees, were laid off for this reason.

F. Further Discussion

It is clear from the record that after Respondent took control of the mine on a number of occasions at various awareness meetings between management and employees, CEO Robert E. Murray told employees that they had made the right decision in voting against union representation when the mine was owned by Kerr-McGee.

It is also clear that when Murray was asked at awareness meetings between management and employees if he would have bought the mine if the employees had voted to be represented by a union Murray, using his fingers, informed employees that the chances of him buying the mine if it were union were "zero."

In January 1999, more than 6 months after the lay off, it became apparent that Respondent needed to hire some additional miners to work on weekends. They were referred to as "weekend warriors." At a series of awareness meetings in early January 1999 CEO Robert E. Murray spoke about the need to hire these additional mines.

It is alleged in the complaint that Murray "informed employees that Respondent would not hire employees who supported the union" and that Murray "informed employees that it had terminated employees because of their support for the union and now that it was rehiring it would not hire employees who supported the union."

In support of these allegations, which, of course, if true would throw light on Respondent's motivation in laying off certain personnel in June 1998, the General Counsel offered four witnesses, Charles Jacoby, Jan Consi, Debra Mikalauskas and Marty Yosanovich.

All four had survived the lay off in June. All four testified about Murray's statements at the January 1999 awareness meetings. The same awareness meeting would be held for different elements of Respondent's work force.

Charles Jacoby, who worked on A crew, testified that Murray stated that he wanted to hire young "non-union oriented" people.

Jan Consi, a member of D Crew, who voluntarily resigned from Respondent's employ in March 1999, testified that at the meeting she attended Murray said that Respondent needed to hire young, experienced "non-union oriented employees."

Debra Mikalauskas, a member of C crew, also testified that Murray in the January 1999 awareness meeting she attended said he wanted to hire experienced "non-union oriented" workers.

Lastly, Marty Yosanovich, a member of C crew, testified that Murray wanted experienced people but he did not want to hire "union people." In February 1999 Yosanovich got into a dispute with management and was asked to quit or he would be fired. Yosanovich quit.

Interestingly enough Yosanovich by his own admission was anti-union during the campaign. Both Consi and Mikalauskas were pro-union during the campaign, and in their opinion, management knew they were pro-union and both survived the June 1998 lay off. However, they are both women and Respondent admits it discriminated in favor of women. In addition, Dwight Pray, who did not testify, was active on behalf of the union and one of two union observers at the election and he also survived the lay off. Again, Respondent admits it discriminated in favor of minorities and Pray is an African-American.

I found Jacoby, Consi, Milkalauskas, and Yasanovich to be credible witnesses and I have no doubt they told what they believed to be the truth. However, Respondent called a large number of witnesses all of whom also appeared credible to testify that Murray did not say what Jacoby, Consi, Mikalauskas, and Yosanavich testified he said about wanting to hire “non-union oriented” workers or not wanting to hire “union people.” The witnesses who contradict the General Counsel’s four witnesses were Michael Jeter, Dan Inabit, Lester Burklow, David Dixon, Francis Hammer, Christopher Barter, Kenneth Hoercher, David Sneed, Dwight Jackson, Travis Tate, and Rodney Powell.

Dudley Williams credibly testified that he recommended two people to be hired after the January 1999 awareness meetings and both were hired and both were union men.

In February 1999 Respondent hired approximately 70 employees and 70% of those hired had a union background.

A number of Respondent’s witnesses who testified that Murray never said he wanted to hire “non-union oriented” employees or “non-union” employees readily admitted that Murray said things that were anti-union, e.g., Francis Hammer testified that Murray had said he was glad Respondent was non-union, Christopher Barter testified Murray said he was not in favor of the union, David Sneed testified that Murray said he would prefer the mine to be union free and Dwight Jackson and Travis Tate testified that Murray said he would not have bought the mine if it had gone union.

While a fact finder may credit one witness over several witnesses who contradict that witness I find in light of all the testimony that the General Counsel’s four witnesses are mistaken about what Murray said in the January 1999 awareness meetings. The only question is the reliability of their testimony. The testimony of the witnesses for the Respondent on this issue, i.e., the 11 referred to above plus Murray and Vice President for Human Resources Bruce Hill cause me to conclude that the General Counsel has failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by Murray’s statements at the January 1999 awareness meetings.

The testimony from Respondent’s highest management, i.e., CEO Robert E. Murray, was that foremen and others who filled out evaluations on employees were told that they were not to consider the union affiliation of employees they were evaluating. A large number of such persons testified they did not consider union affiliation or sentiment in the evaluations they furnished and were told not to consider union affiliation in making their evaluations.

They were as follows: Charles Bowlin, Donald Eroh, Doug Harver, Roy Jones, John Dunn, Calvin Melvin, Dan Ramsey, William Penrod, David Strunk, Jimmy Wilson, Steve Roye, Vern Brotherton, Dave Columbo, Duane Lampert, Vernon Dunn, James Allen, Jerry Whitehead, Daryl Tolbert, Doug Huie, Robert Conn, William Devine, Denzil Hughes, Bruce Hill, and Bob Dupuis.

William Penrod, who is noted above, no longer worked for Respondent when he testified before me but his current employer has Respondent as a customer. Steve Roye and William Devine, also noted above, no longer work for Respondent. Denzil Hughes did not work for Respondent when he testified before me but had applied for a job with Respondent.

The principal issue in this case is not whether Respondent is nice or not but whether Respondent violated the Act in selecting the discriminatees in this case for lay off because of

their union affiliation or their support for the union and in order to discourage employees from engaging in these activities.

A large number of employees were laid off, i.e., 160 salaried and 86 hourly employees. Statistically we can assume that many had families, some had disabled children, and some had fought in battle for their country. Life can indeed be tough.

It is not alleged that Respondent did anything unlawful in effectuating the lay offs. The only question is whether or not the employees selected for lay off were selected in an unlawful manner. In other words the same number of employees with the same statistical profile were going to laid off whether Respondent selected the employees to be laid off in a lawful or an unlawful manner.

I find that Respondent applied neutral objective criteria in selecting employees for lay off and did not violate the Act when it laid off the 33 alleged discriminatees in this case. In reaching this conclusion I rely on the Board's landmark decision in *Wright Line, Inc.*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982). I find Respondent would have selected for lay off the alleged discriminatees in this case even if they had not been active in the union or supportive of the union.

Conclusions of Law

1. Respondent, The American Coal Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act as alleged in the complaint.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER²

The Complaint is dismissed in its entirety.

Dated, Washington, D.C. July 26, 2000

Martin J. Linsky
Administrative Law Judge

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.